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April 26, 1994

Mr. William Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, D.C. 20554

Re: Reply Comments of National Basketball Association
in PP Docket No. 93-21

Dear Mr. Caton:

On behalf of my client, the National Basketball Association, I am filing with your office an original and nine copies of the Reply Comments of the National Basketball Association in the Commission's Further Notice of Inquiry in PP Docket No. 93-21.

Should you have any questions concerning the above, please communicate directly with the undersigned.

Sincerely,

Philip R. Hochberg

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 26 of the Cable Television Consumer Protection and Competition Act of 1992	)	PP Docket No. 93-21
	)	
Inquiry into Sports Programming Migration	)	

REPLY COMMENTS OF THE NATIONAL BASKETBALL ASSOCIATION TO THE FEDERAL COMMUNICATIONS COMMISSION'S FURTHER NOTICE OF INQUIRY

The National Basketball Association ("NBA") submits these reply comments in response to the submission of the Tribune Broadcasting Company ("Tribune"), dated April 11, 1994.

Preliminarily, it deserves emphasis that in the litigation now pending[1] Tribune does not seek to prevent or deter the "migration" of sports programming from broadcast to non-broadcast television. To the contrary, that litigation constitutes an attack by Tribune upon the NBA's contract with the National Broadcasting Company, Inc. ("NBC"), pursuant to which a substantial package of NBA games is carried nationally on broadcast television; and it results from Tribune's insistence that, notwithstanding the provisions of the NBC contract, it be

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[1] Chicago Professional Sports Ltd. Partnership and WGN Continental Broadcasting Co. v. National Basketball Ass'n, No. 90 C 6247 (N.D. Ill.).

permitted to telecast NBA games into the national market over its national cable network, WGN. In practical effect, WGN would anoint itself a national cablecaster of NBA games without obtaining a license from the League or paying fair market value for that license. (The Chicago Bulls, of course, are and remain free to license their games to any broadcaster in the Chicago area, including WGN, provided only that those games are not retransmitted into the national market by means of non-broadcast television.)

In addition, Tribune persists in mischaracterizing the NBA/NBC contract as banning superstation telecasts of NBA games. As the NBA has previously explained,[2] however, the NBC contract, which will make more NBA games available to virtually every household in America on over-the-air television than at any time in the NBA's history, expressly permits the NBA to license up to 85 additional games to national cable networks, including superstations. And, in fact, commencing with the 1994-95 season, the NBA has licensed games for telecast not only on TNT, but on SuperStation WTBS as well.

In its summary of some of the issues pending decision in the ongoing litigation, Tribune advances certain assertions concerning the NBA's reliance upon the Sports Broadcasting Act ("SBA") and the alleged effects of the NBA's Same Night Rule and

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[2] Tribune's recent filing is its second submission to the FCC that attacks the NBA's agreement with NBC; and the arguments advanced by Tribune were addressed in the NBA's Supplemental Comments, dated May 26, 1993.

proposed superstation fee; and we respond briefly to these assertions below.

(1) The Sports Broadcasting Act

Tribune's attack upon the NBA/NBC contract utterly ignores the point that, as the NBA's own national broadcast experience indicates, consumers have been well served by the ability of members of professional sports leagues to make joint national sales of exclusive television packages to broadcast networks. Indeed, without the SBA, every such sale could be the subject of antitrust attack by the unsuccessful bidder(s) for national rights. Ensuring that such contracts may be entered into without antitrust challenge thus fosters the making of national over-the-air arrangements.

In its recent submission, Tribune suggests that the NBA has invoked the SBA in order to justify a reduction in the number of televised games and that it thus seeks a "contorted" construction of the Act "beyond anything heretofore contemplated."[3] The suggestion is wrong in both respects. First, as we have previously informed the Commission (and as to which there is no dispute), the number of NBA telecasts is at an all-time high. Second, the NBA's reliance on the SBA accords fully with the language set forth in 15 U.S.C. § 1291, with the

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[3] Further Comments of Tribune Broadcasting Company ("Further Comments") at 5.

legislative history of the Act[4] -- and, indeed, with its interpretation by the Seventh Circuit in the litigation now pending.[5]

Moreover, as the evidence at trial clearly demonstrated, the exclusivity provisions of the NBA's contract with NBC were requested by NBC. They were, in fact, essential to the making of an arrangement that guarantees free national over-the-air broadcasts of approximately 60 NBA games in each of the next four seasons, more games per season than ever before and more than twice the number of such broadcasts in 1982-83.

(2) The Same Night Rule

The NBA's Same Night Rule has no relevance to the concerns about "migration" because it prohibits only national cable networks (such as WGN) from telecasting an NBA game in the national market on the same night that the NBA's national cable carriers (TNT and WTBS) telecast a game.[6] The Rule has no

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[4] In fact, the House and Senate Reports on the SBA make clear that the very purpose of the SBA was to allow exclusive network arrangements, such as those between the NBA and NBC, that are at issue in the pending litigation. See H. Rep. No. 1178, 87th Cong., 1st Sess. at 2 (Sept. 13, 1961; S. Rep. No. 1087, 87th Cong., 1st Sess., reprinted in 1961 U.S. Code Cong. & Admin. News 3042 (Sept. 20, 1961).

[5] See Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n, 961 F.2d 667, 670 (7th Cir. 1992), cert. denied, 113 S. Ct. 409 (1992).

[6] If the broader provisions in the NBA/NBC contract prohibiting individual teams from licensing the telecast (continued...)

effect on the over-the-air broadcast (or, for that matter, cablecast) of NBA games in the local markets of the competing teams.

In any event, the effect of the Same Night Rule on WGN would simply be to cause WGN to telecast NBA games on Turner "off-nights." Thus, the Rule expands the number of games viewers can see by increasing the number of nights on which games are available.[7]

Further, the Same Night Rule enhances the NBA's ability to distribute its games over a national cable network. Indeed, the provision was insisted upon by Turner which experienced dramatically lower ratings when its NBA telecasts went head-to-head with games telecast in the national market by WGN.

(3) The Proposed Superstation Fee

There would be no Bulls games for WGN to telecast without the agreement and contribution of all of the NBA's 26 other teams. By telecasting NBA games in the national market, the Bulls and WGN are appropriating for their sole benefit--"free riding" on--the collective investments and efforts made by all

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[6](...continued)
of their games in the national market are upheld, the Same Night Rule would, of course, have no practical effect.

[7] The NBA schedules regular season games on approximately 170 days. At most, Turner will telecast games on 70 days, leaving approximately 100 days for WGN to telecast the 37 or 38 Bulls games it claims to desire to telecast.

NBA teams. To prevent such free-riding, the NBA, under applicable law and consistent with the Seventh Circuit's previous decision, is entitled to the fair market value of the opportunity to televise NBA games in the national market--and that (and only that) is the value the proposed fee seeks to recoup.

Based upon the latest data available at the time of trial, application of the NBA's formula would produce a fee (which, in accordance with their contractual arrangements, would be shared equally by the Bulls and WGN) that would still enable WGN to realize profits per game approximately three times greater than those it could realize from any alternative programming. Thus, the proposed fee formula would not diminish WGN's incentive to carry Bulls games or, as Tribune suggests, have the effect of "reducing the number of televised games." (Further Comments at 4.)

Conclusion

In sum, Tribune's submission, made under the guise of a response to the Commission's Further Notice of Inquiry, is no more than a rehash of arguments WGN has advanced in the pending litigation. Those arguments, we submit, have no relevance with respect to the Commission's inquiry into the issue of migration, and they are, in any event, without merit.

Respectfully submitted,

NATIONAL BASKETBALL ASSOCIATION

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